

Roth (Migration) [2018] AATA 1887 (29 April 2018)

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Satsomaley Roth
VISA APPLICANT:	Mr Yichheng Sok
CASE NUMBER:	1611019
DIBP REFERENCE(S):	BCC2015/2014421 BCC2015/3144210
MEMBER:	Carmel Morfuni
DATE:	29 April 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 29 April 2018 at 1:15pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Whether a genuine spousal relationship exists – Parties engaged shortly after meeting – Lack of forward planning – Lack of commitment to a shared life as spouses – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cl 309.211

CASES

Singh v the Minister of Immigration and Ethnic Affairs [1996] FCA 1429

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 12 July 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 27 October 2015 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in *Part 309 of Schedule 2* to the *Migration Regulations 1994* (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include at cl.309 that the applicant is outside Australia and that the application is made at the same time and place as an application for a Partner (Migrant) (Class BC) visa.
3. The delegate refused to grant the visa on the basis visa applicant did not satisfy r.309.211 of the Migration Regulations because he did not satisfy the definition of "Spouse" in Section 5 of the Act and specifically commented on the commitment to having a shared life together and whether the visa applicant and his sponsor (the parties) genuinely intend to live together as spouses.
4. The review applicant appeared before the Tribunal on 21 November 2017 to give evidence and present arguments from the review applicant in person, the visa applicant by telephone and two witnesses in person, Kimchou Sok, the review applicant's sister-in-law and Kim Lang Nhel the review applicant's stepmother.
5. The review applicant was represented at the review by her registered migration representative Mrs. Lilly Chour.
6. The services of a Khymer interpreter were used at the hearing.
7. In making its decision the Tribunal has carefully considered the legislative requirements, the written documentation, photographs and other information provided by the visa applicant and the review applicant, the statutory declarations of several witnesses including those previously mentioned who gave oral evidence at the hearing, the oral evidence of the review applicant in person and of the visa applicant by telephone and the submissions made by Miss Chou as migration representative.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
9. **Background**
10. The visa applicant lives in Cambodia and is currently aged 36. The review applicant was born in Cambodia and is an Australian citizen and is currently aged 35. At the time of the lodging of the Visa application on 27 October 2015, both parties were aged over 18 years.

11. The review applicant was in a previous relationship between 2008 and 2012 and had a son (the child), now aged 6. That relationship ended when the child was six months old.
12. The visa applicant and review applicant commenced a telephone relationship for several months after having been introduced into the relationship by members of their respective families in approximately April 2015.
13. They met for the first time in Cambodia on 4 July 2015. They state in their submitted documentation that they fell in love and committed themselves to each other some five days later on 9 July 2015 and became engaged in Cambodia on 19 July 2015, ten days after having met. The review applicant returned to Australia two days later. Her evidence was that she stayed with her family whilst she was in Cambodia.
14. The Visa applicant lodged the current application on 27 October 2015, three days before the parties' marriage in Cambodia on 1 November 2015.
15. Departmental movement records indicate that the review applicant has visited Cambodia at the following times: from 4 July 2015 - 21 July 2015 (during which time she stayed with her future mother-in-law) and from 23 October 2015 until 18 November 2015, the date of the wedding celebration with her family, after which she stayed with the visa applicant's family until she departed for Australia on 25 November 2015. Her child was being cared for in Australia during those times. Movement records indicate that she has also travelled to Cambodia from 22 January 2017 to 11 February 2017 and similarly, since the hearing, from 27 December 2017 to 12 January 2018.
16. The Visa application was refused on 12 July 2016 on the basis that the parties were not spouses in a genuine and continuing relationship under Regulation 309. The current application for review was lodged on 20 July 2016.
17. **The Hearing - Oral evidence**
18. **The Review Applicant**
19. The review applicant gave the following oral evidence at the hearing.
 - a. She currently lives with her mother, father, four sisters, one brother, two brothers-in-law, her nephew and her 6 year old son (the child), twelve people in all.
 - b. She drops the child off to school (later evidence indicates that a friend drops the child off and the review applicant picks him up) then goes to work in Cranbourne. She receives child support from the child's biological father.
 - c. The review Applicant was not previously married and was in a de facto relationship between 2008 and 2011. The child was the child of that relationship and sees his 27 year old biological father who lives with his parents, at least once a week on weekends and sometimes stays overnight with him.

- d. When asked by the Tribunal how the review applicant sees the future arrangements with respect to the child and specifically the relationship between the child's father and the visa applicant, she said that *I not discuss this in detail* with the visa applicant. When asked further, as to how the relationship between the child's biological father and the visa applicant would work, she said *I do not see there should be any contact ... but they might slowly build up some communication*.
- e. When asked by the Tribunal about the terms of future living arrangements, the review applicant stated that the three of them intended to live at her sister-in-law's three bedroom house with five other people being her sister-in-law and her husband, the review applicant's niece and her brother-in-law and his wife. When asked about the living arrangements she said that her sister-in-law and her husband would use one bedroom, her niece would use the second bedroom, and her brother-in-law and his wife the third bedroom but that the last couple intend to leave next month and that she, the visa applicant and the child will occupy their vacated bedroom. She said they will stay in that home for about five years.
- f. When asked by the Tribunal whether or not the visa applicant would be working in Australia, she says that he would work on a farm where her father works. She said that he could stay overnight at her father's home which is approximately 10 minutes from the farm and come home on weekends. She indicated that there was no room at her father's house for her, the visa applicant and the child to stay, but that they could put an air bed in the living room and the three of them would then sleep on that if necessary.
- g. In terms of her current income, the review applicant said that she receives a parenting payment for herself and the child in the form of single-parent family assistance. When asked why she is not receiving a Partner payment she said because *"that is less than the family payment"*.
- h. The review applicant described commencement of the relationship, in writing as *an arranged* marriage but in oral evidence as a *partly arranged marriage* stating that she was introduced to the visa applicant by her sister-in-law (a witness in these proceedings) as a prospective prospect for the Visa Applicant through photographs and telephone connection which commenced in April 2015 and continued for approximately three months.
- i. The review applicant visited and met the visa applicant in person for the first time on 4 July 2015 in Cambodia, with her sister-in-law and sister. She stated that they fell in love on 6 July 2015 and said that he proposed to her on 9 July 2015, that they stayed at an hotel on 10 July 2015 and were engaged on 19 July 2015. When asked by the Tribunal to describe the engagement she stated that there was no formal engagement or engagement ceremony.
- j. She stated that she was staying at that stage at her mother-in-law's house where there was one bedroom upstairs where her mother-in-law and her sister-in-law and three children slept and that she, the visa applicant and her sister shared a second bedroom where she and the visa applicant slept on the bed and her sister on a mattress on the floor. They stayed there for a couple

of days and then the three of them went to the countryside to see her stepmother's side of the family and stayed at her uncle's house. Her sister slept in a hammock in the lounge room and the visa applicant and review applicant in the same room in the bed. She stated that no intimacy took place and after one day they went back to stay in her mother-in-law's house and otherwise spent their time sightseeing.

- k. The review applicant stated that the wedding took place on 1 November 2015 and was a traditional ceremony. She stated that her mother-in-law and the visa applicant had organised the marriage. At the time of the marriage her child was in Australia with the review applicant's sister.
- l. After the wedding the review applicant said that she and the visa applicant stayed two nights with her mother-in-law then went sightseeing staying at a hotel. They stayed with her mother-in-law until the review applicant returned to Australia on 25 November 2017.
- m. The review applicant stated that at present her stepmother does the cooking in the household and that the review applicant does the shopping and the cleaning.
- n. In relation to her interests, she stated that she enjoys movies, shopping and family outings and that the visa applicant was interested in football.

20. **The visa applicant**

- 21. The visa applicant provided a comprehensive written statement with similar information about the introduction to the relationship and timelines of meeting, falling in love, engagement and marriage. When specifically asked about the engagement however, he indicated that it was a traditional engagement marked officially by the traditional carrying of food including fruit to the review applicant's mother's house (the Tribunal noted that this was in stark contrast to the version provided by the review applicant who stated there was no marking of the engagement at all). The review applicant was present in the hearing room and upon hearing the evidence of the visa applicant, the Tribunal observed that the review applicant became visibly distressed.
- 22. When asked by the Tribunal how he thought his relationship with the child and his biological father would work out he stated that he and the review applicant agreed that *there will be no problem* and that they would *do our best to avoid any problem* but that they would discuss it again. He stated that *they had not discussed this in detail because he* (the visa applicant]) *had asked her* (the review applicant) *and she said there was no problem.*

23. **The witnesses**

- 24. Kim Chou Sok, the visa applicant's older sister who resides in Australia stated that she has seen the parties together. She says they are happy together, they get along well, they help it each other and she would like the Visa to be granted so that they *can help each other*

25. Kim Lang Nhe, the review applicant's stepmother stated that in her view the relationship between the review applicant and the visa applicant is genuine and based on this having heard them talk on the telephone.
26. Mrs Kim confirmed that there are 10 people currently living in her house in four bedrooms and some sleep in the living room making it clear to the Tribunal that the home is very crowded. In response to a question from the Tribunal, she stated that it would be easier for her and generally more comfortable if the review applicant and her son moved out and lived with the visa applicant elsewhere.

27. **BACKGROUND**

CONSIDERATION OF CLAIMS AND EVIDENCE

28. The issue in the present case is whether the parties meet the criteria in Regulation 309.211 and therefore qualify as *spouses* under s5 of the Act in that they must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing and the couple must live together, or not live separately and apart on a permanent basis.
29. The matters to be considered by me are whether the parties meet the criteria in the Regulation as spouses and if not, whether they had indicated an intention to marry under r.309.211(3) or could be considered as being in a de facto relationship and therefore meet the criteria in Regulation 309.221

Whether the parties are in a spouse or de facto relationship

30. Regulation 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen or satisfies Regulation 309.211(3) which requires determination of whether the parties had an intention to marry at the date of application and were spouses at the date of decision.
31. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

32. **Time of Application**

33. The parties became engaged on 19 July 2015, evidencing that time, an intention to marry. They lodged the visa application on 27 October 2015 and married on 1 November 2015. The Tribunal therefore finds that the visa applicant meets the requirement in r.309.211 (3).

34. **Time of decision**

35. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship

- must be married to each other under a marriage that is valid for the purposes of the Act,
- there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others,
- the relationship must be genuine and continuing, and
- the couple must live together, or not live separately and apart on a permanent basis: s.5F (2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the following:

36. Under r.1.15A (3) which is extracted in the attachment to this decision, the Tribunal must also consider and make findings in relation to the following:

- financial aspects of the relationship
- social aspects of the relationship
- the nature of the visa applicant's and review applicant's household
- the parties commitment to each other

Are the parties validly married?

37. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship.
38. On the written and oral evidence provided, The Tribunal finds that the parties were married to each other in Cambodia on 1 November 2015 as the result of a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
39. The Tribunal has also considered whether the other requirements for a spousal relationship set out below have been met based on the oral evidence and written information before it:

40. Consideration under Regulation 1.15A

• Financial aspects of the relationship

- I find that on the evidence provided, there is no joint ownership of assets or joint liabilities, no pooling of financial resources, no sharing of day-to-day household expenses and no legal obligations owed to the other party other than by law as husband and wife.

- The review applicant's child is totally supported by his mother including child support which she receives from the child's biological father. The written and oral evidence from both parties indicates that that will continue to be the case in the future. There is currently no other evidence of joint responsibility for care and support as there are no other children besides the child who is supported fully by his mother. I find on the basis of the written and oral evidence before

me of both parties that the review applicant (with the assistance of her former husband) is the only person involved in the financial support of the child.

- There was no evidence that the parties are in any way financially engaged together however, in exercising my discretion, I attach limited weight to this requirement given their current living arrangements in different countries and draw no negative conclusions in relation to it.

-

- **Nature of the household**

- I find on the evidence before me that as the parties live in different countries there are no joint living arrangements including any sharing of housework. I have attached little weight to the issues relating to living arrangements and a shared household in relation to house work and the like and draw no negative conclusions.

- **Social aspects of the relationship** – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

- The parties have provided written witness statements from relatives which profess that the parties love each other based on the witness' observations specifically around the engagement and the wedding.

- The parties represent themselves as a married couple. Their socialising has been limited to family, the engagement, wedding, normal sightseeing and like outings whilst the review applicant has visited the visa applicant in Cambodia. I do not draw any negative inferences from the limited time they have spent together socially given that they live in different countries. Whilst in Cambodia, they have stayed with the visa applicant's relatives or at a hotel.

- The parties independently profess in their written evidence that the visa applicant and the child have a good relationship as a result of visits to Cambodia by the review applicant and the child and frequent telephone contact between the visa applicant and the child. I draw no adverse inferences from the limited contact between them,

- **Nature of persons' commitment to each other** – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

- The parties met on 4 July 2015, committed themselves to each other in terms of falling in love according to their written statements on 9 July 2015 and according to the oral evidence of the review applicant on 6 July 2015. The parties have stated that they became engaged on 19 July 2015 at the Visa applicant's mother's home and married on 1 November 2015.

- During the hearing the parties gave different statements about their engagement the review applicant stating that there was no engagement celebration, the visa applicant stating that there was an engagement celebration involving visiting the review applicant's family with fruit and food as is the tradition in Cambodia. The review applicant became visibly distressed at the hearing upon hearing the visa applicant's evidence. This matter and the evidence however did not impact on the Tribunal's final decision.

- In support of their commitment to each other the parties have produced numerous photographs of both their engagement and wedding showing numerous attendees

- I find that the parties did not have an *arranged marriage* as it is commonly understood. I find that they were introduced to each other and commenced a telephone and photograph exchange relationship, fell in love and committed themselves within five days of that introduction, became engaged 10 days later and two days after that, the review applicant returned to Australia.

- The evidence indicates that the plans for the wedding were made by the visa applicant and his mother. In some places the evidence is that they were made by the visa applicant and his sister. I do not attach weight to the discrepancies as the essence of the evidence is that the visa applicant and a member or members of his family organised the wedding.

- The Tribunal does not accept however, that the overall evidence indicates a genuine emotional commitment, emotional support or companionship or a commitment to a shared life together by either of the parties.

- Future plans - the parties stated in writing and orally that whilst they would like to have children, they would not do so whilst they were still looking after the review applicant's child.

- They allude very little to their plans in relation to living together or sharing their lives. The visa applicant states that he intends to work on the review applicant's father's farm, live in his nearby house and come home to the review applicant on weekends.

- The parties state that when in Australia, they would for some time, share a 3 bedroom house with twelve people and when two of those twelve move out, the parties and the child will continue to live there and thereafter move and live with other relatives.

- The Tribunal specifically asked the parties how they saw the relationship between the visa applicant, the child, the child's biological father and the review applicant. Both the Visa applicant and the review applicant stated that they had had little discussion about it but "*see no problems*". The evidence of both parties is that the review applicant with support from the child's biological father has and will continue to have the full financial and other responsibilities for the child.

- **Findings**

- The Tribunal finds that the oral evidence from both parties indicates that there has been very little genuine discussion in relation to relationship issues which may arise between the parties, the child and his biological father who is exercising his paternal rights and responsibilities, in the future. It is, in the Tribunal's view inconsistent with the genuine and committed relationship for such an important matter as the introduction of a step parent into the life of a child who also has an ongoing relationship with his biological father in Australia, to have been dealt with in the manner outlined by essentially saying they *do not believe there will be any problems*. It does not indicate to the Tribunal that the matter has been given serious thought or discussion. The Tribunal finds that it is not consistent with a serious ongoing or long-term emotional or other commitment.

- A further example which raised the issue of reliability of the evidence was in relation to the marriage, the parties' claims stating at times that it was an "arranged marriage", then changing the story to "a partially arranged marriage" then to "an introduced marriage". This reinforces the Tribunal's conclusion and casts doubt on the parties' general credibility.

- The Tribunal specifically finds the evidence of the review applicant unreliable.

- **Credibility**

41. In *Singh v the Minister of Immigration and Ethnic Affairs* [1996] FCA 1429 (paragraph 13), the Federal Court of Australia stated:

"...the test as to whether the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others involves considerations of subjective intentions of the parties to the relationship in relation to which, issues of credibility assume particular significance and which are crucial to a determination of whether or not what each party asserts about his or her commitment to the relationship can be accepted." (emphasis added).

42. The credibility issue was raised by the Tribunal and drawn to the attention of the parties and their representative by it at the hearing, giving them an opportunity to address and comment on it further. The general comments were that the parties were genuine, loved each other and were committed to the relationship.

43. **Conclusion**

44. Under s5F the Tribunal must also consider and make findings as to whether there is a continuing relationship, whether the parties live together to the exclusion of all others and not separately and apart on a permanent basis.

- Having considered the totality of the evidence including the matters previously outlined and discussed at paragraph 30 and set out in r.1.15A including

45. r.1.15A (3), the Tribunal has not placed weight on any one consideration or circumstance of the parties relationship, rather, it is considered all the evidence collectively, including placing weight on the oral evidence at the hearing of the parties and has concluded that the parties did

not satisfy the Tribunal that the visa applicant has appropriate knowledge of the circumstances particularly surrounding the child, consistent with that of persons in a married relationship and of the relationship itself.

- Importantly the Tribunal has difficulty in accepting the genuineness of and the development of the parties' relationship having regard to the following:
 - a. The rapidity of the development of the relationship having been introduced and communicated briefly by telephone, meeting in person for the first time in Cambodia on 4 July 2015, falling in love on 9 July 2015 which coincided with the proposal of marriage, becoming engaged 10 days later on 19 July 2015, the review applicant returning to Australia two days later and then subsequently undertaking a traditional Cambodian marriage organised by her mother in law and the visa applicant for 1 November 2015 in Cambodia.
 - b. The review applicant has a son from a previous *de facto* relationship and as the Tribunal has outlined above, there appears to have been little consideration or discussion of that issue prior to the parties meeting, the parties stating on a number of occasions in their evidence that the review applicant will look after the child totally. The parties' oral evidence indicates in the Tribunal's view, that the parties have given scant consideration to the future implications of the important relationships involving a young child and the concurrent roles of his mother and both his biological father and a stepfather in his life and their interaction, dismissing these issues as "*no problems*" without inclusion of the biological father of the child. This matter was drawn to their attention by the Tribunal at the hearing however there was no further comment. In the Tribunal's view, these matters mitigate against the commitment and genuineness of the parties' relationship to each other.
 - c. The past, existing and proposed working and living arrangements - the pattern provided in evidence, was that the parties essentially move in with someone who is able to offer them accommodation such as a relative, often in existing cramped and overcrowded conditions (see paragraph 16 above) and the Tribunal will not repeat them.

46. Whilst the Tribunal accepts that different cultures adopt different attitudes to such matters, it was clear, at least from the evidence of the review applicant's step mother that such arrangements are not ideal and that she would welcome them living together elsewhere, notwithstanding that she supports the relationship.

47. The Tribunal has concluded that there was little forward planning by the parties regarding future accommodation for the family other than the opportunistic accommodation arrangements as described, as they arose.

48. On the totality of the evidence and information before it, the Tribunal cannot be satisfied that the parties see their relationship as long-term, that they draw emotional

support and companionship for each other, or that they have a commitment to a shared life together as spouses.

49. Therefore, the Tribunal is not satisfied that at the date of decision the Visa applicant and review applicant had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. They therefore do not meet the requirements of section 5F(2)(b) and section 5F (2) (c) for a married relationship.
50. For these reasons the Tribunal finds that at the date of decision the visa applicant and review applicant were not in a spouse relationship within the meaning of section 5F(2) of the Act and therefore the visa applicant does not meet the requirements of clause 309. 221.

Conclusion

51. Given the finding that the requirements of that clause have not been satisfied, and for the reasons above, the visa applicant does not satisfy the criteria to the grant of the visa.

DECISION

52. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Carmel
Morfuni

Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:

- (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).